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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. [redacted] 62

THE TOLEDO BLADE COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

THE SOBO PRINTING CO., INC., NEW YORK, N. Y.

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THE TOLEDO BLADE COMPANY,
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v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment entered by the United States Court of Appeals for the Sixth Circuit on February 9, 1950, affirming a decision of The Tax Court of the United States.

Opinions Below

The opinion of the Court of Appeals is reported at 180 F. 2d 357 and is printed in the record (R. 93-95). The opinion of the Tax Court is reported at 11 T.C. 1079, and is printed in the record (R. 37-49).

Basis of Jurisdiction

Jurisdiction is invoked under Title 28, United States Code, section 1254(1).

Questions Presented

1. Did the Court of Appeals err in denying a deduction in each of the years involved of a pro rata portion of the cost of covenants not to compete for ten years on the ground that one of the covenants was purchased to protect a capital investment in other assets acquired?

2. Did the Court of Appeals err in affirming the decision of the Tax Court that the agreements for the purchase of certain intangible assets of the Toledo Newspaper Company and for the purchase of ten year covenants not to compete of The Toledo Newspaper Company and The E. W. Scripps Company are indivisible and that, accordingly, neither class of assets had a definite cost, although the contract of purchase dealt with the assets and the covenants separately and a separate purchase price for each was stated in the contract and paid?

Summary Statement

The undisputed evidence in the case is a stipulation of the parties (R. 62-63); Joint Exhibit 29-CC, which is part of the stipulation (R. 64-78); and testimony of Mr. Smith Davis, petitioner's newspaper expert (R. 52-61).

For many years petitioner, an Ohio corporation, has owned and published The Toledo Blade newspaper in Toledo, Ohio (R. 38). Prior to August 1, 1938, a competing newspaper, The Toledo News-Bee, was published by The Toledo Newspaper Company, of which The E. W. Scripps Company was the controlling stockholder (R. 42-43, 62-64, 66).

On August 1, 1938, petitioner entered into a contract with The Toledo Newspaper Company and The E. W. Scripps Company (R. 64-78, Joint Exhibit 29-CC). The contract provided in Paragraph I-(a) that in consideration of the payment by petitioner of $780,000., The Toledo Newspaper Company agreed that for a ten-year period it would (1) discontinue publication of The Toledo News-Bee, (2) not resume publication of any newspaper in Toledo, and (3) not permit its plant or equipment to be used for the publication of any newspaper in Toledo (R. 64-65). The E. W. Scripps Company, as an inducement to petitioner to enter into the contract, agreed in Paragraph II that for a ten-year period it would not, directly or indirectly, commence or become financially interested in any way in the establishment or publication in the City of Toledo, Ohio, and Lucas County, Ohio, of any newspaper not in existence at the time of the contract (R. 66).

Paragraph III-(a) provided for the purchase by petitioner from The Toledo Newspaper Company of the name "The Toledo News-Bee", the circulation, route, subscription, dealer and carrier lists, statements of account and distribution records (R. 64, 66). Paragraph III-(b) and (c) provided that the consideration for the sale of these assets was $100,000 plus petitioner's promise to pay the seller 50% of any tax savings resulting from the allowance to petitioner of deductions for the exhaustion of the covenants not to compete, except that petitioner would retain the first $25,000 of such savings and the seller would not receive over $50,000 (R. 67-70).

Petitioner made separate payments for each of the two classes of assets purchased. Petitioner paid for the ten-year covenants not to compete by the issuance of its Series "A" promissory notes totalling $780,000. Petitioner made the payment of $100,000 for the other class of assets by the issuance of its Series "B" promissory notes totalling $100,000 (R. 41, 65, 67, 75-78).

In its returns for the taxable years 1938 to 1942, inclusive, petitioner deducted a pro rata portion of the cost of these covenants not to compete based on a ten year life (R. 44). Respondent disallowed these deductions (R. 12-35, 45). The majority of the Tax Court sustained respondent's determination, holding that none of the assets acquired had a definite cost which petitioner could recover through deductions for amortization or depreciation under section 23 (l) of the Internal Revenue Code (R. 48); that the contract was not divisible and that the aggregate consideration of $880,000 was the price which petitioner paid for the going business and intangible assets, including the goodwill and the covenants not to compete (R. 47).

Four Tax Court Judges dissented on the grounds (1) that the majority opinion disregarded the undisputed evidence that the sum of $780,000 was paid for the covenants not to compete; (2) that the Commissioner offered no evidence to show that the cost of the covenants was less than $780,000; and that (3) petitioner had, in any event, paid a substantial portion of the total of $880,000 for the covenants and under the decision of this Court in *Helvering* v. *Taylor,* 293 U. S. 507 (1935), and other cases, it was "incumbent" upon the Tax Court "to determine what portion of the total consideration may properly be regarded as the cost of the agreement not to compete for the purpose of allowing deductions under section 23 (l)" of the Internal Revenue Code. (R. 48-49.)

Section 23 (l) provides that in computing net income there shall be allowed as deductions:

> "Depreciation.—A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—
>
> (1) of property used in the trade or business, or
>
> (2) of property held for the production of income."

The Court of Appeals affirmed the decision of the Tax Court and added a novel principle of its own in its opinion as follows:

> "It being our view that the purchase by the petitioner of certain assets of the competing newspaper, the value of which to the purchaser was protected by covenant of the seller that it would not resume publication of a newspaper for ten years constituted a capital investment, Now THEREFORE,
>
> "IT IS ORDERED that the decision of the Tax Court be and it is hereby affirmed upon the findings of fact and conclusions of law announced by the Tax Court in docket No. 12827, promulgated December 23, 1948." (R. 93-95).

Reasons for Granting the Petition

1. The Court of Appeals in holding that a pro rata portion of the cost of property purchased to protect a capital investment in other assets may not be deducted each year during the life of such property under Section 23 (l) of the Internal Revenue Code, has enunciated a new doctrine which is of wide-spread application and of great importance to the business community and the proper administration of the revenue laws.

2. The decision of the Court of Appeals that a pro rata portion of the cost of covenants not to compete for ten years is not deductible each year during the life of the covenants under Section 23(l) of the Internal Revenue Code is in direct conflict with the decisions of this Court in *Helvering* v. *F. & R. Lazarus & Co.*, 308 U.S. 252 (1939) and *Duffy* v. *Central Railroad Co. of N. J.*, 268 U. S. 55 (1925), with the decision of the Court of Appeals for the Second Circuit in *Bonwit Teller & Co.* v. *Commissioner*, 53 F. 2d 381 (1931), certiorari denied 284 U. S. 690 (1932), and with the decision of the United States Court of Claims in *Christensen Machine Co.* v. *United States*, 50 F. 2d 282

(1931), all of which hold that property used in a trade or business or held for the production of income is subject to an allowance for exhaustion over its life under section 23(l) of the Internal Revenue Code.

3. The decision of The Tax Court of the United States that the cost of the covenants not to compete for ten years may not be deducted during the life of the covenants is in direct conflict with its own decisions in *B. T. Babbitt, Inc.*, 32 B.T.A. 693 (1935); *Eitingon-Schild Co., Inc. and Subsidiaries*, 21 B.T.A. 1163 (1931); *Black River Sand Corporation*, 18 B.T.A. 490 (1929); *Christensen Machine Co.*, 18 B.T.A. 256 (1929); and *Farmers Feed Co. of New York*, 17 B.T.A. 507 (1929).

4. The decision of the Tax Court held only that the cost of certain intangible assets of The Toledo Newspaper Company and the cost of the ten year covenants not to compete of The Toledo Newspaper Company and The E. W. Scripps Company are indivisible and neither class of assets had a definite cost, even though the contract of purchase stated separate considerations therefor, and even though there was oral evidence of the value of such covenants and no contrary evidence was introduced by respondent. This is in direct conflict with the rule stated by this Court in *Chesapeake & Ohio Railway Co.* v. *Martin*, 283 U. S. 209, 218 (1931).

5. The Court of Appeals refused to follow the rule stated by this Court in *Helvering* v. *Taylor*, 293 U. S. 507 (1935), by the Court of Appeals for the Second Circuit in *Cohan* v. *Commissioner*, 39 F. 2d 540 (1930) and *Commissioner* v. *Maresi*, 156 F. 2d 929 (1946), and by the Court of Appeals for the Sixth Circuit in *Durkee v. Commissioner*, 162 F. 2d 184 (1947), in failing to remand the case to the Tax Court for a determination of the cost to petitioner of the covenants not to compete for ten years if in the opinion of the Court of Appeals such cost was other than $780,000.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit should be granted.

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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions below have been referred to in the petition for writ of certiorari under this same caption.

JURISDICTION

The statement as to jurisdiction has been set forth in the petition.

STATEMENT OF THE CASE

The facts have been stated in the Summary Statement in the petition.

SPECIFICATIONS OF ERROR

1. The Court of Appeals erred in denying a deduction in each of the years involved of a pro rata portion of the cost of covenants not to compete for ten years on the ground that one of the covenants was purchased to protect a capital investment in other assets acquired.

2. The Court of Appeals erred in affirming the decision of the Tax Court that the agreements for the purchase of certain intangible assets of The Toledo Newspaper Company and for the purchase of ten year covenants not to compete of The Toledo Newspaper Company and The E. W. Scripps Company are indivisible and that, accordingly, neither class of assets had a definite cost.

ARGUMENT

I. The Court of Appeals erred in denying a deduction in each of the years involved of a pro rata portion of the cost of covenants not to compete for ten years on the ground that one of the covenants was purchased to protect a capital investment in other assets acquired.

On August 1, 1938, petitioner entered into a contract with The Toledo Newspaper Company and The E. W. Scripps Company, pursuant to which it acquired intangible assets of The Toledo Newspaper Company for $100,000., and in accordance with separate provisions of the contract and in consideration of a separate payment by petitioner of $780,000., The Toledo Newspaper Company agreed that for a ten year period it would (1) discontinue publication of The Toledo News-Bee, (2) not resume publication of any newspaper in Toledo and (3) not permit its plant or equipment to be used for the publication of any newspaper in Toledo. As an inducement to petitioner to enter into the contract, The E. W. Scripps Company, which was the controlling

stockholder of The Toledo Newspaper Company, agreed that during a ten year period it would not commence or become financially interested in the establishment or publication in Toledo, Ohio and Lucas County, Ohio, of any newspaper not then in existence.

The Court of Appeals in its opinion has disregarded all of the foregoing covenants except the covenant of the seller that it would not resume publication for ten years and has then denied any deduction of the cost of such covenant on the ground that the purchase by petitioner of certain assets of the competing newspaper constituted a capital investment which was protected by such covenant (R. 93).

Since the Court of Appeals in its opinion has found that the covenant not to compete was competent during its ten year existence to protect the value of assets purchased, the covenant necessarily had an important, intrinsic and actual value, which the Court of Appeals and the Tax Court should have found to be the amount of $780,000 specified in the contract or some other amount not exceeding the aggregate of $780,000 and $100,000, the purchase prices specified in the contract and paid by petitioner for the separate classes of assets.

The Court of Appeals should have given regard to all of the covenants not to compete for ten years and then allowed a deduction in each of the years involved of a pro rata portion of the cost of such covenants under §23(l) of the Internal Revenue Code, quoted *supra*, page 4. *Duffy* v. *Central Railroad Co. of N. J.*, 268 U. S. 55 (1925); *Helvering* v. *F. & R. Lazarus & Co.*, 308 U. S. 252 (1939); *Bonwit Teller & Co.* v. *Commissioner*, 53 F. 2d 381 (1931) certiorari denied 284 U. S. 690 (1932); *Christensen Machine Co.* v. *United States*, 50 F. 2d 282 (Ct. Cls. 1931); *B. T. Babbitt, Inc.*, 32 B. T. A. (1935); *Eitingon-Schild Co., Inc. and Subsidiaries*, 21 B. T. A. 1163 (1931); *Black River Sand Corporation*, 18 B. T. A. 490 (1929); *Christensen Machine Co.*, 18 B. T. A. 256 (1929); and *Farmers Feed Co. of New York*, 17 B. T. A. 507 (1929).

In 4 Mertens, Law of Federal Income Taxation (1942) § 23.68, the following statement of the law is made:

> "An agreement not to compete is property used in a trade or business and is subject to an allowance for exhaustion over the period referred to in the agreement."

In *Duffy* v. *Central Railroad Co. of N. J.*, 268 U. S. 55 (1925), the taxpayer in 1916 expended money for improvements to property it leased from the City of New York and sought to deduct such amounts in 1916 on the theory that they were expenses paid within the year. In referring to the expenditures, this Court said at page 63:

> "They constituted, not *upkeep*, but *investment;* not maintenance or operating expenses, * * * but capital, subject to annual allowances for exhaustion or depreciation * * *." (Italics in original).

In *Helvering* v. *F. & R. Lazarus & Co.*, 308 U. S. 252 (1939), this Court said at page 254:

> "While it may more often be that he who is both owner and user bears the burden of wear and exhaustion of business property in the nature of capital, one who is not the owner may nevertheless bear the burden of exhaustion of capital investment. Where it has been shown that a lessee using property in a trade or business must incur the loss resulting from depreciation of capital he has invested, the lessee has been held entitled to the statutory deduction."

The basic fallacy in the Court of Appeal's approach is the assumption that where a covenant not to compete is primarily designed to protect other property acquired, the former may not be bargained for separately and paid for separately. Suppose that a covenant not to compete does accompany a sale of assets and is designed to protect the purchaser in his enjoyment of such assets. Does that mean

that the seller may not require additional consideration for the covenant not to compete? Does he not, when he gives up the right for a substantial period of time to re-enter a profitable business field, surrender something of value to him over and beyond the actual business he is selling?

An individual purchasing land may, for the purpose of protecting his purchase, at the same time and for a separate consideration acquire from the same vendor a business building having a ten year life which is situated on contiguous land. It is a *non sequitur* to contend that merely because one species of property is designed to protect the other and the vendor of the building is the same person as the vendor of the property to be protected, the separate costs should not be recognized for the purpose of allowing deductions for depreciation of the building under section 23(l) of the Internal Revenue Code.

Petitioner contends that whether the purchase prices of covenants not to compete and of other assets may be determined separately depends solely upon the fact question of whether the evidence in the case affords a basis for such separate determination. The attempt of the Court of Appeals to lay down a principle of law that, despite the separate statement and separate payment of the consideration, the cost of the covenants not to compete may not be determined separately for purposes of the depreciation allowance, is judicial legislation and should be rejected.

It is submitted that whether or not petitioner purchased the covenants to protect its capital investment in other assets acquired, the covenants were exhaustible assets with a definite cost and a limited life and therefore a pro rata portion of such cost should be deductible each year during such life.

II. The Court of Appeals erred in affirming the decision of the Tax Court that the agreements for the purchase of certain intangible assets of The Toledo Newspaper Company and for the purchase of ten year covenants not to compete of The Toledo Newspaper Company and The E. W. Scripps Company are indivisible and that, accordingly, neither class of assets had a definite cost.

The contract of August 1, 1938 (R. 64, Joint Exhibit 29-CC) provided in paragraph I (a) that in consideration of the payment by petitioner of $780,000, The Toledo Newspaper Company agreed to carry out the terms of three covenants not to compete for a period of ten years. In paragraph II, The E. W. Scripps Company agreed that for a ten year period it would not compete with petitioner in the newspaper business in Toledo and Lucas County, Ohio.

Paragraph III provided for the purchase by petitioner from The Toledo Newspaper Company of intangible assets for $100,000.

Paragraphs I and III of the contract are complete and independent. They do not refer directly or indirectly to each other. Each group of provisions constitutes in itself an entire and separate contractual undertaking. The contract not only recites the separate consideration for each class of assets, but separate payments were made for each class.

The courts below disregarded the contract and lumped the separate payments into an aggregate payment, and further erred by refusing to make an allocation of such lump sum to the separate assets which were acquired.

Petitioner submits that as a matter of law the contract and testimony established the separate costs of each class of assets purchased. The parties to the contract specified therein that $780,000 of the total was paid for the covenants not to compete. Furthermore, Mr. Smith Davis, petitioner's expert witness, testified to the great value attributable to

the elimination of competition in the newspaper field. He pointed to the newspaper situation in the State of Ohio and stated that millions of dollars had been spent in cities like Cleveland, Cincinnati, Columbus, Akron, Toledo and Youngstown to eliminate competition (R. 60). The testimony was elicited upon examination by respondent's counsel. The respondent offered no evidence to show that the cost of the covenants not to compete was less than $780,000. In the absence of such contrary evidence, the contract and the supporting testimony is determinative of the issue.

In *Chesapeake & Ohio Railway Co.* v. *Martin*, 283 U.S. 209 (1931) this Court said at page 218:

> "Where * * * the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities; nor, in its nature, surprising, or suspicious, there is no reason for denying to it conclusiveness."

If the covenants had a cost to petitioner other than the cost set forth in the contract, then in any event something was paid for the covenants so that it was incumbent upon the Court of Appeals to reverse the decision of the Tax Court and remand the case with directions to determine what portion of the total consideration may properly be regarded as the cost of the covenants not to compete for the purpose of allowing deductions under section 23 (l) of the Internal Revenue Code. *Helvering* v. *Taylor*, 293 U.S. 507 (1935); *Cohan* v. *Commissioner*, 39 F. 2d 540 (2nd Cir. 1930); *Durkee* v. *Commissioner*, 162 F. 2d 184 (6th Cir. 1947).

The Tax Court's dissenting opinion in the instant case states:

> "Judge Learned Hand said in *Commissioner* v. *Maresi*, 156 Fed. (2d) 929: 'The one sure way to do injustice in such cases is to allow nothing what-

> ever upon the excuse that we cannot tell how much to allow.' That comment is apposite here, where the majority opinion allows no deduction for the exhaustion of this contract not to compete, which contract obviously cost the petitioner a substantial amount of money." (R. 49).

Petitioner contends that the Tax Court's dissenting opinion is correct in its statement of the law and that if the covenants not to compete had a cost to petitioner which is other than the cost set forth in the contract, then and in such event the Court of Appeals erred in failing to reverse the decision of the Tax Court and in failing to remand the case with directions to determine the amount of such cost and to allow a deduction during each of the years involved of a pro rata portion of such amount.

CONCLUSION

It is, therefore, urged that the petition for writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

No. 809

THE TOLEDO BLADE COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 37-49) are reported at 11 T. C. 1079. The judgment of the Court of Appeals for the Sixth Circuit (R. 93-95) is reported at 180 F. 2d 357.

JURISDICTION

The judgment of the Court of Appeals was entered on February 9, 1950 (R. 93). The petition for a writ of certiorari was filed on May 8, 1950. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Did the Tax Court and the Court of Appeals err in concluding that the record did not disclose that any ascertainable amount of the $880,000, paid by taxpayer to Toledo Newspaper Company for certain of its intangible assets and a ten-year covenant not to compete, was depreciable under Section 23(l) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(l)[1] [As amended by Section 121 of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Depreciation.*—A reasonable allowance for exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, * * *

* * * * *

(26 U. S. C. 1946 ed., Sec. 23.)

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[1] Section 23(l) as reproduced above was effective under Section 121 (d) of the Revenue Act of 1942, *supra*, for taxable years beginning after December 31, 1938. Section 23(l) of the Revenue Act of 1938, c. 289, 52 Stat. 447, effective for the first of the tax years here involved, 1938, provided as follows:

(l) *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. * * *

Treasury Regulations 103, promulgated under the Internal Revenue Code:

> Sec. 19.23(l)-3.[2] *Depreciation of intangible property.*—Intangibles, the use of which in the trade or business is definitely limited in duration, may be the subject of a depreciation allowance. Examples are patents and copyrights, licenses, and franchises. Intangibles, the use of which in the business or trade is not so limited, will not usually be a proper subject of such an allowance. If, however, an intangible asset acquired through capital outlay is known from experience to be of value in the business for only a limited period, the length of which can be estimated from experience with reasonable certainty, such intangible asset may be the subject of a depreciation allowance, provided the facts are fully shown in the return or prior thereto to the satisfaction of the Commissioner. No deduction for depreciation, including obsolescence, is allowable in respect of good will.

STATEMENT

This case involves income, declared value excess profits taxes and excess profits taxes. The years involved are 1938 through 1942. (R. 37.) The facts

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[2] This provision of the Regulations is effective for the tax years 1939 through 1941 here involved. Art. 23(l)-3 of Treasury Regulations 101, effective for the year 1938, and Sec. 29.23(l)-3 of Treasury Regulations 111, effective for 1942, are identical with their counterpart in Treasury Regulations 103 set forth above and are, accordingly, not reproduced here.

pertinent to the sole issue here, as found by the Tax Court, may be summarized as follows:

Taxpayer, an Ohio corporation, is the owner and publisher of an evening newspaper, the Toledo Blade, in Toledo, Ohio (R. 38). The Toledo News-Bee was an evening newspaper and a competitor of the taxpayer. The News-Bee was owned and published prior to 1938 by the Toledo Newspaper Company. The taxpayer desired to have the publication of the Toledo News-Bee discontinued. It, accordingly, entered into a contract on August 1, 1938, with the Toledo Newspaper Company and the E. W. Scripps Company, the owner of a majority of the newspaper company's voting stock. Under the terms of the contract, the taxpayer agreed, for $100,000, to purchase the name "The Toledo News-Bee" and "the circulation, route, subscription, dealer and carrier lists and other assets," excluding, however, the plant and equipment. The Toledo Newspaper Company agreed for the stated consideration of $780,000 to discontinue publication of the Toledo News-Bee for a period of ten years. (R. 42-44.)

The contract also provided that the taxpayer and the Toledo Newspaper Company would share equally in any tax savings which might result to the taxpayer from deductions taken in its returns on account of the $780,000 payment (R. 44).

In its returns for the taxable years, the taxpayer claimed amortization deductions on account of the

alleged $780,000 cost of the restrictive covenant contained in the agreement with the Toledo Newspaper Company amounting to $32,500 in 1938 and $78,000 for each of the years 1939 to 1942, inclusive. The Commissioner determined that these deductions were not allowable. (R. 44-45.)

The Tax Court, four judges dissenting, approved the Commissioner's determination, holding that under the contract with Toledo Newspaper Company, the taxpayer acquired the former's business and good will, including the agreement not to compete, in a single transaction, for the lump sum of $880,000, and that this did not result in the taxpayer's acquisition of any property subject to amortization or depreciation (R. 45-48). The Court of Appeals affirmed, stating in its judgment, *inter alia,* that the decision of the Tax Court is affirmed "upon the findings of fact and conclusions of law announced by the Tax Court" (R. 95).

ARGUMENT

Taxpayer does not dispute that intangible assets not definitely limited in duration are not subject to depreciation under Section 23(l) of the Internal Revenue Code, *supra,* p. 2. Section 19.23(l)-3, Treasury Regulations 103, *supra,* p. 3; *Dodge Brothers* v. *United States,* 118 F. 2d 95 (C. A. 4th); *Clark Thread Co.* v. *Commissioner,* 100 F. 2d 257 (C. A. 3d); *Meredith Pub. Co.* v. *Commissioner,* 64 F. 2d 890 (C. A. 8th), certiorari denied, 290 U. S. 646; *Red Wing Malting Co.* v. *Willcuts,* 15 F. 2d

626 (C. A. 8th), certiorari denied, 273 U. S. 763; *Landsberger* v. *McLaughlin*, 26 F. 2d 77 (C. A. 9th). Contracts for a definite period, including those not to compete, where unaccompanied by a sale of assets, by the same token, have been treated as depreciable assets. *International Curtis Marine Turbine Co.* v. *United States*, 56 F. 2d 708 (C. Cls.); *Eitingon-Schild Co. and Subsidiaries* v. *Commissioner*, 21 B. T. A. 1163; *Black River Sand Corp.* v. *Commissioner*, 18 B. T. A. 490. But where, as here,[3] the contract not to compete was not in fact separately dealt with, but was intended merely to protect the transfer of the vendor's name, circulation, lists and other elements of good will, the Tax Court has consistently denied depreciation deductions because the covenant in reality is a part of the good will, and is, therefore, itself of unknown duration. *Toledo Newspaper Co.* v. *Commissioner*, 2 T. C. 794; *Michaels* v. *Commissioner*, 12 T. C. 17; *Horton* v. *Commissioner*, 13 T. C. 143, 147. See also, *Jones* v. *Commissioner*, 17 B. T. A. 1213; *Limbert Co.* v. *Commissioner*, 9 B. T. A. 1390; *Market Supply Co.* v. *Commissioner*, 3 B. T. A. 841. This

[3] The record establishes that the purpose of taxpayer in entering into the agreement of August 1, 1938, with Toledo Newspaper Company was to eliminate the Toledo News-Bee as a competitor. The purchase of that name, together with the "circulation, route, subscription, dealer and carrier lists * * *" was calculated to accomplish that result. (R. 43.) The testimony of taxpayer's witness establishes that upon the transfer of the name, circulation lists and certain other assets, the former publishers were effectively eliminated as competitors of taxpayer because, he pointed out, it is now virtually impossible to start a new newspaper. (R. 56.)

largely factual determination,[4] concurred in by both courts below, is fully supported by the record and clearly presents no occasion for the issuance of the writ. Cf. *Goodyear Co.* v. *Ray-O-Vac Co.*, 321 U. S. 275, 278; *Virginia Ry.* v. *Federation*, 300 U. S. 515, 542; *Baumgartner* v. *United States*, 322 U. S. 665. The assertion (Pet. 5) that the Court of Appeals has enunciated a "new doctrine" of "widespread application" is, then, not accurate. The Court of Appeals merely approved the Tax Court's view of the facts similar to the Tax Court's views in other cases of long standing.

1. Taxpayer alleges "direct" conflict with fourteen decisions of this Court, the Courts of Appeals, the Court of Claims and the Tax Court. (Pet. 5-6.) There is no merit in these assertions. *Helvering* v. *Lazarus & Co.*, 308 U. S. 252; *Duffy* v. *Central R. R.*, 268 U. S. 55; and *Bonwit Teller & Co.* v. *Commissioner*, 53 F. 2d 381 (C. A. 2d), certiorari denied, 284 U. S. 690, dealt with different questions—respectively, whether a lessee of department store property was in reality the owner and hence con-

[4] In *Toledo Newspaper Co.* v. *Commissioner*, 2 T.C. 794, 802, 806, relied upon by the Tax Court in this case, the following finding of fact was made: "In the purchase of a newspaper business, as a going concern, it is customary that the purchaser require of the seller, in addition to the conveyance of the assets making up the newspaper business, tangible or intangible, or both, a covenant to refrain for a reasonable period from reentering into the business of publishing a newspaper within the territory in which the newspaper of the seller circulated at that time. *This is necessary in order to prevent the seller from destroying the value of the good will of the business transferred.*" (Italics supplied.)

cededly entitled to depreciation; whether improvements to property made by a lessee could be deducted as business expenses or added to the cost of the lease and depreciated; and whether a lease was depreciable at all and if so over what period of time. Reliance by the taxpayer on unassailable statements in these opinions, to the effect that property used in the trade or business is depreciable, is misplaced, because it overlooks the established exception contained in the Regulations and uniformly accepted by the courts that property of indefinite duration is not depreciable. See Section 19.23(l)-3, Treasury Regulations 103, *supra*, p. 3 ; *Dodge Brothers* v. *United States* and the other cases cited, *supra*, pp. 5-6.

Christensen Mach. Co. v. *United States*, 50 F. 2d 282 (C. Cls.), not only is not in conflict (Pet. 5-6) with the Tax Court's result here, but actually follows a Tax Court decision in which the Christensen Machine Company's tax liability for another year was resolved. *Christensen Machine Co.* v. *Commissioner*, 18 B. T. A. 256. In those cases, the Tax Court and the Court of Claims were in agreement that the purchase of Christensen's stock in the taxpayer by the latter and Christensen's agreement not to compete were in fact bargained and paid for separately. The record in those cases, almost the antithesis of the record here,[5] showed that the es-

[5] See fn. 3, *supra*.

sence of the agreement was Christensen's promise not to compete.

2. The alleged "conflict" (Pet. 6) with the various Tax Court decisions[6] similarly does not exist. Even if those older decisions of the Tax Court were inconsistent with the instant decision, this circumstance at best would only show that the Tax Court has changed its mind since there can be no dispute that its later decisions are precisely in accord with its decision here.[7] A change in the Tax Court's views, approved by the Court of Appeals and not inconsistent with decisions of this Court or other Courts of Appeals, obviously presents no occasion for the issuance of the writ. But it is not even the fact that the present decision is inconsistent with the cited cases. Thus, in *B. T. Babbitt, Inc.* v. *Commissioner,* 32 B. T. A. 693, the court stated (p. 696) that a covenant not to compete is depreciable if it is for a fixed period, but that where the benefits are permanent or indefinite, no depreciation is permitted. The record in this case, as we have already seen, places this case in the latter category. *Farmers Feed Co. of New York* v. *Commissioner,* 17 B. T. A. 507, is similar to the *Babbitt* case. There is no con-

[6] *B. T. Babbitt, Inc.* v. *Commissioner,* 32 B.T.A. 693; *Eitingon-Schild Co. and Subsidiaries* v. *Commissioner,* 21 B.T.A. 1163; *Black River Sand Corp.* v. *Commissioner,* 18 B.T.A. 490; *Christensen Machine Co.* v. *Commissioner,* 18 B.T.A. 256; and *Farmers Feed Co. of New York* v. *Commissioner,* 17 B.T.A. 507.

[7] *Toledo Newspaper Co.* v. *Commissioner,* 2 T.C. 794; *Michaels* v. *Commissioner,* 12 T.C. 17; *Horton* v. *Commissioner,* 13 T.C. 143.

flict with *Eitingon-Schild Co. and Subsidiaries* v. *Commissioner,* 21 B. T. A. 1163, and *Black River Sand Corp.* v. *Commissioner,* 18 B.T.A. 490, because unlike this case, the covenant not to compete was unrelated to a transfer of other assets, physical or intangible. Obviously, in such a situation, it is not possible to conclude that the covenant not to compete assumes the indefinite duration of simultaneously transferred intangibles.

3. Taxpayer's reliance (Pet. 6) on *Chesapeake & Ohio Ry.* v. *Martin,* 283 U. S. 209, 218, is misplaced. It asserts (Pet. 6) that there is in this case unrebutted testimony of the separate value of the covenant not to compete. Actually, as we have shown, *supra,*[8] the opposite is more nearly the fact, but, in any event, the decision rests not so much on a failure of proof as on the circumstance that a covenant not to compete, designed to protect a transfer of good will, is not depreciable because, like good will, its effectiveness is indefinite.

4. For this same reason there is no inconsistency with the rule of *Helvering* v. *Taylor,* 293 U. S. 507; *Cohan* v. *Commissioner,* 39 F. 2d 540 (C. A. 2d); *Commissioner* v. *Maresi,* 156 F. 2d 929 (C. A. 2d); and *Durkee* v. *Commissioner,* 162 F. 2d 184 (C. A.

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[8] See fn. 3, *supra.*

6th).[9] Even were this a case where it would have been permissible for the Court of Appeals to have remanded to the Tax Court in order to give the taxpayer a second chance to prove its case, there is nothing in *Helvering* v. *Taylor, supra,* which requires it.[10] But since the basis of the decision was that the covenant was not in any event depreciable, proof of its value would not have aided taxpayer.

CONCLUSION

The decision below is correct. There is no conflict of decisions. The petition should be denied.

Respectfully submitted,

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JUNE, 1950.

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[9] See also the Tax Court's decision of August 15, 1949, on remand (1949 P-H T.C. Memorandum Decisions Service, par. 49,192), affirmed *per curiam,* by the Court of Appeals for the Sixth Circuit on April 13, 1950 (1950 P-H, par. 72,534).

[10] This Court's statement of the question in that case was (p. 512) "whether, the taxpayer having failed to establish the correct amount to be assigned to the preferred stock as its cost to him, the court erred in reversing and remanding for further proceedings in accordance with its opinion."

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